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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

TREVON DARRELL BROWN,

Defendant and Appellant.

C086413

(Super. Ct. No. 15F02610)

Defendant Trevon Darrell Brown was convicted of second degree murder and evading a peace officer causing serious bodily injury. (Pen. Code, § 187, subd. (a); Veh. Code, § 2800.3.) The trial court sentenced him to state prison for 15 years to life for the murder conviction, plus five years consecutive for the evading conviction.

On appeal, defendant contends his trial counsel was ineffective in failing to argue that portions of his statement to police were admissible as nonhearsay. He further contends the prosecutor committed misconduct by commenting on defendant's decision

to plead not guilty and exercise his right to a jury trial. Finally, defendant contends the cumulative effect of the alleged errors requires reversal. We will affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Instant offense*

At 6:00 p.m. on April 26, 2015, Sergeant Scott MacLafferty and Detectives Sara Butler and Zachary Eaton were driving in a car when they saw defendant crossing the street. A man and a dog accompanied defendant.

The officers were aware that defendant had a pending juvenile felony arrest warrant; they pulled over and exited the car. When they tried to arrest defendant, he ran several hundred feet toward a minivan. Butler and Eaton chased defendant, but he got into the minivan and drove it toward Butler. He suddenly stopped three to six inches from Butler's legs. Butler drew her gun, instructed defendant to stop, and threatened to shoot.

Defendant put his hands up and said, "I'm scared. I don't want to go back to jail." He looked directly at Butler when he spoke, and he moved his hands up and down, "almost as if he was trying to figure out if he was going to stop the van or flee." After 30 seconds, defendant then put the minivan in reverse, turned the minivan around, and drove away.

Two officers each pursued defendant in their vehicles for 0.6 miles through a residential area with a 25-mile-per-hour speed limit. One of the pursuing officers testified that, during the chase, defendant drove through a red light and two stop signs without stopping. Each of the pursuing officers testified that defendant was driving at least 50 miles per hour during the chase. Video recordings from the pursuing officers' car cameras were played for the jury.

The chase ended when defendant, who was driving at a high rate of speed, drove through a stop sign and hit a pickup truck. The driver of the truck was ejected from the vehicle and suffered injuries to his head, spine, and ribs; he was hospitalized for over a

month. The police collision investigator testified at trial that there was no evidence that either defendant or the driver of the pickup truck applied their brakes before colliding.

Defendant also hit and killed a pedestrian, and then crashed into a tree and a house. Officers found defendant hanging out of the driver's side window, with his right leg stuck under the steering wheel. After defendant was removed from the minivan, officers arrested him and transported him to the hospital.

2. *Defendant's statement to police at the hospital*

Two days after the incident, defendant was still in the hospital when he told police that Detective Butler had "dealt with" him before. Defendant claimed she had "twisted me up pretty good when she took me to jail before," so he ran when she tried to arrest him. Defendant said he put the van into reverse because Butler "said she was going to shoot me," and the officers' guns were pointed at him. Defendant said he "would have gone with anyone else. I thought she was going to kill me." Defendant initially told police that he drove normally and lawfully after fleeing from Butler. After police told him that his version of events did not match the video from the police cars, defendant acknowledged that he may have run a stop sign and said he "shouldn't have been running from the police."

Before trial, the prosecution moved to exclude the statement, arguing it was inadmissible hearsay, irrelevant, and highly prejudicial. Defense counsel acknowledged that defendant could not introduce his own statement, but argued the statement would be admissible if he testified. Defense counsel argued that defendant had been charged with second degree murder based on implied malice, making his state of mind relevant because the prosecution was required to prove beyond a reasonable doubt that defendant deliberately acted with conscious disregard of the safety of others. Defense counsel further noted there was a subjective element to implied malice. The trial court ultimately ruled that, if defendant testified, he could testify about his mental state the day of the incident and his fear of Detective Butler. In the end, defendant did not testify.

### 3. *Closing argument*

During closing argument, the prosecutor argued that the jury should convict defendant of second degree murder based on a theory of implied malice, rather than the lesser included offense of involuntary manslaughter. According to the prosecutor, defendant continued to drive recklessly despite knowing that doing so was dangerous to human life. The prosecutor acknowledged that defendant may initially have been conflicted about what to do because he did not want to go back to jail. Ultimately, argued the prosecutor, defendant consciously chose to avoid jail by fleeing in the minivan, “no matter how dangerous it was to human life.” The prosecutor further explained that involuntary manslaughter was similar to second degree murder, but only required criminal negligence, which only requires a reasonable person standard. The prosecutor argued, “You get to decide what applies and what doesn’t apply. You get to decide whether involuntary manslaughter applies or is the defendant still running from the full responsibility of what he did which is murder in this case.” The prosecutor made five comments to the effect that defendant was “running from the full responsibility of what he did,” and “not accepting full responsibility for what he did.”

## DISCUSSION

### I

Defendant contends his counsel was ineffective in failing to argue that portions of his statement to police at the hospital regarding Detective Butler were admissible as nonhearsay evidence, whether or not he exercised his right to testify. According to defendant, the statement was relevant to implied malice as required to establish second degree murder. We disagree that the statement was relevant and accordingly find defendant’s contentions without merit.

To establish a claim of ineffective assistance of counsel, a defendant must prove that (1) trial counsel’s representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency

resulted in prejudice to defendant, meaning there is a “reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” (See *People v. Mai* (2013) 57 Cal.4th 986, 1009; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674, 693, 698].) Trial counsel’s representation is not deficient “for failing to make meritless objections.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; see also *People v. Price* (1991) 1 Cal.4th 324, 387 [“counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile”].)

Defendant fails to establish that his counsel’s representation was deficient. As explained in *People v. Watson* (1981) 30 Cal.3d 290, 300, “second degree murder based on implied malice has been committed when a person does ‘ “ ‘an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life’ ”. . . .’ [Citation.] Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.” The jury was properly instructed regarding the standard for implied malice pursuant to CALCRIM Nos. 520 and 580.<sup>1</sup>

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<sup>1</sup> With respect to implied malice, the jury was instructed pursuant to CALCRIM No. 520 as follows: “The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] And [¶] 4. He deliberately acted with conscious disregard for human life.” (CALCRIM No. 520, as given.)

The jury also was instructed pursuant to CALCRIM No. 580 as follows: “The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and done

While defendant's prior interactions with Detective Butler might be relevant as to why he fled in the minivan, they had nothing to do with whether he acted with conscious disregard for human life while driving. In other words, defendant's professed fear of Detective Butler might be relevant to his initial flight, but it would not negate his knowledge that his acts of speeding in a residential zone and running stop signs and traffic signals were dangerous to human life. Given that defendant did not present an affirmative defense that would have implicated whether his state of mind justified his actions, his statement to police at the hospital was irrelevant. Any motion to admit them despite his failure to testify would have been meritless. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) Defendant's claim of ineffective assistance of counsel therefore fails.

## II

A prosecutor commits misconduct by "using deceptive or reprehensible methods of persuasion." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) Reversal is not necessary unless it is "reasonably probable that a result more favorable to the defendant would have been reached in its absence." (*Ibid.*)

Defendant argues the prosecutor committed prejudicial misconduct during closing argument by improperly commenting on defendant's decision to exercise his right to a jury trial. In support of his contention, defendant notes that it is improper for prosecutors to comment on a defendant's decision not to testify (*Griffin v. California* (1965) 380 U.S. 609, 615 [14 L.Ed.2d 106, 110]) and to be represented by counsel (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 387 ["[g]uilt cannot be inferred from the reliance on a constitutional right"]). Defendant points to five comments by the prosecutor during his closing and rebuttal arguments to the effect that defendant was

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[in] a conscious disregard of that risk is murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter." (CALCRIM No. 580, as given.)

“running from the full responsibility of what he did,” and “not accepting full responsibility for what he did.” Defendant argues these comments could “only reasonably be understood as a comment on [defendant’s] failure to plead guilty” and exercise his right to have a jury trial.

As defendant acknowledges, his trial counsel failed to object to this alleged misconduct and seek an admonition during trial. The record fails to disclose grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction to avoid forfeiture of the argument. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205 [“[a] failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm”].) Although the prosecutor generically commented that defendant was “still running” and not accepting responsibility for his actions, the prosecutor did not reference defendant’s not guilty plea or decision to proceed to trial. This is not the type of serious misconduct that would render a curative admission ineffective. (See *U.S. v. Smith* (11th Cir. 1991) 934 F.2d 270, 275 [although the prosecutor improperly remarked that the defendant “ ‘has not taken responsibility for his actions’ ” because he refused to plead guilty, unlike his codefendants who entered guilty pleas, the error was harmless because the trial court gave a “clear and complete instruction to the jury immediately after the improper comment,” and there was “ample evidence” to support the conviction].) We therefore agree with the People that defendant’s claim of prosecutorial misconduct was forfeited.

In a related argument, defendant contends that his trial counsel was ineffective for failing to object and request an appropriate admonition. We reject defendant’s claim because he has failed to establish prejudice. (See *People v. Mai, supra*, 57 Cal.4th at p. 1009 [to establish a claim of ineffective assistance of counsel, a defendant must prove that (1) trial counsel’s representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency

resulted in prejudice to defendant, meaning there is a “reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different”]; see also *Strickland v. Washington, supra*, 466 U.S. at pp. 687-688, 694.)

Defendant’s guilt was established by both direct and indirect evidence. The responding police officers saw defendant drive off in the minivan. The jury watched a video recording of the ensuing 0.6-mile chase and heard testimony that defendant was driving at least 50 miles per hour in a residential area with a 25-mile-per-hour speed limit. Defendant failed to stop at stop signs and a red light, and a witness testified he saw defendant drive into the pickup truck and hit the pedestrian. A responding police officer testified that defendant was found at the crash scene, stuck in his vehicle. There was evidence regarding the injuries suffered by the driver of the pickup truck and the pedestrian. There is no reasonable possibility that the verdict would have been any different had defense counsel objected to and requested an admonition on the challenged remarks by the prosecutor.

Given our conclusions, we also reject defendant’s related argument of cumulative error.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_KRAUSE\_\_\_\_\_, J.

We concur:

\_\_\_\_\_ROBIE\_\_\_\_\_, Acting P. J.

\_\_\_\_\_HOCH\_\_\_\_\_, J.